In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. [redacted] 30

WILLIE CARTER, SR., JOHN HEAD,
PERCY McSHAN,
APPELLANTS

versus

JURY COMMISSION OF GREENE
COUNTY, ALABAMA, et al.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF AND ARGUMENT OF APPELLEES

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INDEX

Page

QUESTIONS PRESENTED 1, 2

STATEMENT OF THE CASE 2, 3

ARGUMENT I 3

Tit. 30 §21 Code of Alabama, 1940, as amended is not unconstitutionally vague.

ARGUMENT II

The Jury Commission was not Unconstitutionally Constituted 7

CONCLUSION 14

CASES CITED

Page

Cassell v. Texas, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839 6

Clay v. United States, 397 F. 2d 901 (1968) 9, 10

Fikes v. Alabama, 263 Ala. 89, 81 So. 2d 303 5

Franklin v. South Carolina, 218 U.S. 161, 30 S. Ct. 640, 54 L. Ed. 980 4

Louisiana v. United States, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 ..... 4, 5

Mitchell v. Johnson, 250 F. Supp. 117, (M.D. Ala. 1966) 10, 14

Moore v. Henslee, 276 F. 2d 876 ..... 11, 12, 14

Smith v. Texas, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84 9

Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 11

White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 10, 14

STATUTES CITED

Page

Title 30, Section 9, Code of Alabama 1940, as amended 13

Title 30, Section 10, Code of Alabama 1940, as amended 13

Title 30, Section 21, Code of Alabama 1940, as amended 1, 3, 5, 6

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QUESTIONS PRESENTED

I

WHETHER TITLE 30 SECTION 21 OF THE CODE OF ALABAMA AS AMENDED IS UNCONSTITIONALLY VAGUE IN VIOLATION OF THE *FOURTEENTH AMENDMENT* IN ITS PROVISION THAT "THE JURY COMMISSION SHALL PLACE ON THE JURY ROLL AND IN THE JURY BOX THE NAMES OF *ALL CITIZENS* OF THE COUNTY WHO ARE GENERALLY REPUTED TO

BE HONEST AND INTELLIGENT AND ARE ESTEEMED IN THE COMMUNITY FOR THEIR INTEGRITY, GOOD CHARACTER AND SOUND JUDGMENT" BECAUSE SUCH PROVISION PROVIDES ALABAMA JURY OFFICIALS WITH THE OPPORTUNITY TO DISCRIMINATE ON RACIAL AS WELL AS OTHER GROUNDS.

II

WHETHER THE JURY COMMISSION OF GREENE COUNTY, ALABAMA WAS UNCONSTITUTIONALLY CONSTITUTED WHERE THERE WAS A COMPLETE ABSENCE OF EVIDENCE THAT THERE HAD BEEN DISCRIMINATION IN THE SELECTION OF THE COMMISSIONERS.

STATEMENT OF THE CASE

Although the Appellants have fairly accurately given the Court a short hand rendition of the chronology of the case, Appellees would like to add thereto the following:

The District Court, in its opinion, found, as a fact, the following:

> "At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. * * *
>
> "Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for considera-

tion. Those potenetially qualified but whose names were never focused upon were given no consideration. * * *

* * * * * *

"In January, 1967, after this suit was filed, an extraordinary session of the jury commission was held. Part of its work was to add females to the jury list, as a result of the September, 1966, amendments by the Alabama legislature extending jury service to women. The procedure for obtaining names to be added to the list, including the names of Negroes, was the same as that previously employed. There is evidence that more persons, including more Negroes, were asked for suggestions than in the past, but the system remained the same."

The District Court also found that the allegation of discrimination in the selection of Jury Commissioners failed for want of proof (A. 365).

Further, the District Court found that Alabama's jury procedures, if followed, would insure a cross-section of the community (A. 364 & 365).

ARGUMENT

I

Appellants contend that Title 30, Section 21, Code of Alabama 1940 (Recompiled 1958), as amended, is unconstitutionally vague because of its provision that jury officials of a county place on the jury roll and in the jury box the names of all citizens of the county, " * * * *who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment* * * * " (Appellants' Brief, p. 6).

They contend that the above quoted criteria provide such officials with the opportunity to discriminate on racial as well as other grounds in their selection of State Jurors in violation of the Fourteenth Amendment to the Constitution of the United States (Appellants' Brief pp. 12-13).

Appellants assert that the factual record in this case supports the fact that the racial exclusion found by the lower Court to have existed resulted from resort by the Jury Commissioners to the alleged vague statutory criteria (Title 30, Section 21), (Appellants' Brief, p. 11), and that the nexus between the "vague" standards and the significant racial exclusion can be demonstrated (Appellants' Brief, p. 19).

Yet, the facts are uncontroverted and are in fact attested to by Appellants' brief itself (Appellants' Brief, pp. 6 & 7), that there was virtually no resort to the criteria by the Jury Commissioners and it can hardly be demonstrated that a nexus exists between the racial exclusion and the standards which were never applied.

Appellants concede that this Honorable Court sustained a South Carolina statute containing substantially similar criteria as Title 30, Section 21, *supra*, against an attack identical to the one that they now make on the above Alabama statute in *Franklin v. South Carolina*, 218 U.S. 161, 30 S. Ct. 640, 54 L. Ed. 980; but are sure that " * * * such authority as *Franklin* may once have possessed * * * has been eroded," in light of *Louisiana v. United States*, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d. 709 (Appellants' Brief p. 17).

In that case this Honorable Court affirmed a District Court's holding that a Louisiana Constitutional amendment which required every applicant for voter registration "there-

after to 'be able to understand' as well as 'give a reasonable interpretation' of any section of the State or Federal Constitution 'when read to him by the registrar' " (380 U.S. at p. 149), was violative of the *Fourteenth Amendment.*

However, this "interpretation test" was found to be *as written, and as applied,* a part of a successful plan by the Louisiana Legislature to deprive Louisiana Negroes of their right to vote (380 U.S. at p. 151). It was found to have been used successfully to deprive otherwise qualified Negro citizens of their right to vote (380 U.S. at p. 150). The evidence showed that " * * * colored people, even some with the most advanced education and scholarship, were declared by voting registrars [administering the 'test'] with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States." (380 U.S. at p. 153).

Thus the *purpose* and the *effect* of the amendment was clearly shown to have been to deprive the Negro of his right to vote. (380 U.S. 150, note 9).

Such was not shown to be the case with regard to Title 30, Section 21. There was absolutely no showing by Appellants that the Alabama Legislature had racial discrimination in mind when it adopted Title 30, Section 21, as was clearly the case in *Louisiana v. U.S., supra.*

Exactly the contrary was shown by the Alabama Supreme Court's understanding of the Legislature's intent in *Fikes v. Alabama,* 263 Ala. 89, 81 So. 2d 303. There the Alabama Supreme Court stated that although the Commissioners had a very delicate task to perform which involved sound judgment and practical discretion, which was gen-

erally not revisable by the courts insofar as quashing an indictment or venire for the reason that they failed to *literally* place the name of *every* qualified person on the roll or in the jury box, "They must act in good faith and not omit a segment of people who are qualified to serve without a fair representation. *And that applies to racial difference.*" 263 Ala. at p. 95. (Emphasis added).

There was absolutely no showing that the criteria set out in Title 30, Section 21 had been applied discriminatorily, for as the factual record clearly shows, for the most part, they were not applied at all.

Thus Appellees respectfully submit to this Honorable Court that the racial discrimination found in this case resulted from the failure of the Commissioners and Clerk to familiarize themselves with the qualifications of all the potentially eligible jurors of the county, without regard to race or color as the Alabama statutes with regard to jury selection require, as was found to be the case in *Cassell v. Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839. It resulted from a failure on the part of the Commissioners to consider the Negroes' qualifications at all; not the discriminatory application of the criteria set out in Title 30, Section 21, as against such qualifications.

This amounted to a breach of duty on the part of the Commissioners in violation of Title 30, Section 21 itself, in that Title 30, Section 21 requires the Commissioners to consider *"all citizens"* in the county which the record in this case plainly shows they failed to do.

Therefore, Appellees submit that were the criteria in Title 30, Section 21 to be voided as unconstitutionally vague,

the problem from which the racial exclusion resulted in this case would still remain.

II

The Jury Commission of Greene County, Alabama as presently constituted does not violate the Constitution of the United States.

The amended complaint filed in the U. S. District Court for the Northern District of Alabama by the appellants alleged that the "segregated, all white Defendant Jury Commission of Greene County, Alabama * * * is unconstitutionally constituted" and asked the District Court to "vacate the appointment of the segregated, all white Defendant Jury Commission, declaring Defendant Jury Commission vacant, and compelling Defendant Wallace to select new members without discrimination." (A 12 & 13).

Then, at the trial of the case, the counsel for appellants declined to stipulate to certain matters before the Court concerning the Jury Commission and its makeup, and indicated that he did not have the evidence he wanted and therefore did not wish this piece of evidence. (A 278-279).

Then the District Court, at the end of the trial and while instructing counsel as to briefs, had this to say:

> "We have noted also three points of law that perhaps are not adequately covered in the briefs on the law filed to date.
>
> "The first one is eliminated because of the plaintiff's statement that they cannot proceed with the theory of

a Constitutional violation by the appointment of all white jury Commissioners."

In the District Court's opinion, the following is found:

"The attack on the racial composition of the commission fails for want of proof." (A. 365)

To put this issue of the case in proper perspective, then, we have the Appellants in the District Court alleging that there had been discrimination in the selection and appointment of the Jury Commissioners; then they ask that the Jury Commission be vacated and new members selected and appointed by the Governor without discrimination, but, before the District Court can rule on their request, counsel for Appellants says he has no evidence to support such complaint and does not wish to pursue it further. Then the trial court finds as a fact that there is no evidence of discrimination in the selection and appointment of the Greene County Jury Commissioners and holds that the allegation in the complaint fails for lack of proof.

Yet when the Appellants get to this Court they still insist that the Greene County Jury Commission should be vacated and new members appointed without discrimination on the ground—not that there has been discrimination in the selection and appointment of the Commissioners by the Governor, the theory upon which this action was commenced—but that the white Commissioners have systematically excluded Negroes from the jury roll and jury box.

It is suggested to this Court that the probable reason for ignoring the allegation and prayer of the complaint that the Commission was appointed in a discriminatory fashion was that, (1) the District Court found that there was not

one single piece of evidence to support such a contention, and (2) even though Appellants have a constitutional right not to be systematically excluded from the jury roll and jury box of Greene County, Alabama, *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84, they have not shown that they are constitutionally entitled to be appointed to the Jury Commission itself.

Compare the case of *Clay v. U. S.*, 397 F. 2d 901, (1968), wherein the Fifth Circuit Court had this to say:

> "No court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted. No question is raised that the boards which considered Appellant's classification were not regularly and properly constituted under appointment by the President, recommended by the governor. * * *
>
> * * * *
>
> "Nor is appellant's argument meritorious that composition of draft boards is similar to that of grand and petit juries. The right to trial by jury has specific constitutional authority. However, nothing in the Constitution or the Universial Military Training and Service Act requires racially proportionate selective service boards. It is not difficult to understand the reasons which support the prior rulings of the Supreme Court and this Court in the jury selection cases where convictions have been set aside for failure to have representative numbers of Negroes on jury venires. [citations] The boards are administrative agencies with specific duties, many of

them purely ministerial, which are provided for by the Act and Selective Service Regulations. * * * "

The close similarity between the case at bar and *Clay v. U. S., supra*, permits us to point out that Appellants have cited no authority authorizing or requiring Negroes to be represented on the Jury Commission of Greene County, Alabama.

The District Court found as a fact that:

"In practice most of the work of the Commission has been devoted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all." (A. 358)

In other words, the District Court found from the evidence that the Commission had not been complying with the statutes of Alabama for obtaining prospective jurors.

The remedy for this omission on the part of the Commission was an order by the District Court to the Commission to " * * * take prompt action to compile a jury list for Greene County, Alabama in accordance with the laws of Alabama and the constitutional principles set out in this judgment and in the opinion of the court entered this date." (A. 372)

Such an order will assure a fair cross-section of the jury eligible population of the County being on the jury roll and in the jury box. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala.

1966); and *Mitchell v. Johnson*, 250 F. Supp. 117 (M. D. Ala. 1966).

Would the relief requested of this Court by the Appellants, *i.e.* vacate the appointments to the Greene County Jury Commission and make new ones, give the relief heretofore ordered by the District Court?

It is respectfully submitted that it will not.

Suppose this Court should order the District Court to vacate the appointment and order the Governor to make new ones. Will it also say what persons are to be appointed? Will it say how many Negroes shall be on the Greene County Jury Commission? Will it be one, two or three?

In *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759, this Court held that an exact ratio of Negroes to total population is not required to be reflected on the jury roll. Would the same principle apply to the Commission itself?

The Court of Appeals for the Eighth Circuit in *Moore v. Henslee*, 276 F. 2d 876, considered a question very similar to the one presented here by the Appellants, and this is what that Court said:

> "The focal point of appellants' contention, as advanced in their brief and in oral argument, is that discrimination in the selection of jury panels in Miller County, Arkansas, is necessarily practiced because the Negro race is not represented on the jury commission which is composed of three citizens. It is suggested that 'it is almost impossible' for an all-white jury commission to keep in-

formed of the habits and qualifications of the Negro population so that eligible members of that race can be selected for jury duty. We are not persuaded by this novel argument which fails to find support in either precedent or logic. Adoption of the principle contended for would require indulgence in the unwarranted presumption that jury commissioners entirely of one race will not discharge their 'duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.' Cassell v. State of Texas, 339 U.S. 282, at page 289, 70 S. Ct. at page 633. Moreover we are satisfied that the theory advanced by appellants would in reality lead to complexities in the administration of an important facet of our system of trial by juries. Application of the principle contended for, could not, in our view, be limited to the white and negro races. It would encompass all races, and the numerous nationalities and religious denominations existent in this country. * * * "

The Court in *Moore v. Henslee, supra,* recognized the many problems involved in attempting a solution such as suggested by Appellants.

Should the Court as requested by Appellants order that Negroes be placed on the Greene County Jury Commission, would that order be satisfied by placing one Negro on the Commission? If so, the desired result would not be accomplished for he would be outvoted by the whites if they still retained their "southern racial traditions."

Would two black members on the Jury Commission assure the elimination of systematic exclusion of Negroes from the jury roll? It could, but not necessarily so. Suppose the

Governor appointed Negroes to the Jury Commission who would not place the names of Negroes on the rolls? An order similar to the one now in effect would have to be given to achieve the results desired by Appellants.

So the appointment of Negroes to the Commission would not necessarily mean that Negroes would appear in any larger numbers on the jury roll than they have in the past.

Now suppose that the two black members of the Commission put Negroes on the jury roll to the exclusion of the whites and other nationalities in the county, would not the white minority then have a complaint that they were being systematically excluded from the jury roll by a black majority of the Commission? And would not this be an unconstitutional procedure?

For how long would the Governor be enjoined to appoint two or three Negroes to the Jury Commission of Greene County, Alabama?

Would it be until the laws of Alabama and the opinion and judgment of the District Court have been complied with? If that be the period of time for the appointments, then there is no need for such an injunction for those results have been accomplished by the order of the District Court entered on September 13, 1968, requiring the elimination of systematic exclusion of Negroes from the jury roll.

However, if this be the criteria for the length of time the injunction would remain in effect; then, upon the accomplishment of this result, should it be presumed the Governor would once again be free to choose members of the Jury Commission so long as they possessed the qualifications required by Title 30, Sections 9 and 10, Code of Alabama 1940, as Recompiled 1958?

In view of all the pitfalls inherent in such a course as suggested by the Appellants, I am again very much impressed by the judgment of the Court in *Moore v. Henslee, supra,* and suggest to this Court that such an argument as presented by Appellants is not "supported in either precedent or logic."

Furthermore, would not the following directive issued to the Jury Commissions of Lowndes and Macon Counties, Alabama by the U. S. District Court for the Middle District of Alabama in the cases of *White v. Cook, supra,* and *Mitchell v. Johnson, supra,* really be the remedy the Appellants are seeking:

> "Failure on the part of the defendant jury commissioners and the defendant jury commission clerk to comply immediately and in good faith with the requirements of this opinion and order will necessitate the appointment by this Court of a master or panel of masters to recompile the jury roll and to empty and refill the Lowndes County jury box. This action, if it becomes necessary, would be only for the purpose of having the requirements of the law fulfilled. * * * "

CONCLUSION

Appellees respectfully request this Court to affirm the judgment of the U. S. District Court for the Northern District of Alabama in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for the Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May 1969 I served a copy of the foregoing Brief upon: Hon. Jack Greenberg, Hon. Norman C. Amaker, Hon. James N. Finney, 10 Columbus Circle, New York, New York 10019; Hon. Orzell Billingsley, Jr., 1630 Fourth Ave., North, Birmingham, Alabama 35203, Attorneys for Appellants, by depositing a copy in the United States mail, first class postage prepaid and properly addressed to each of them at the given address.

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